IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 448

R. E. HOOD,
Petitioner,

vs.

RUBY GAY HOOD,
Respondent.

RESPONDENT'S BRIEF OPPOSING CERTIORARI

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STATEMENT OF THE CASE

Petitioner makes virtually no reference to the underlying facts in the Statement of the Case. These facts, which were not challenged on appeal and are not in controversy on this petition, are recited in considerable detail in the opinion of the Court of Appeals. (Appendix A1-A8) In summary, they are as follows: Petitioner (husband) and respondent (wife) had been married for twenty years.

They had two children who were minors at the time of the divorce. In June, 1959, the wife decided to seek a legal separation. She consulted the family lawyer, who was also their neighbor, in the small town of Liberal, Kansas. He counseled her to seek a divorce instead of a separation. During the next two weeks, she had several conferences with the lawyer and he encouraged her to come to an agreement with her husband on a division of their property and the custody of the children. The husband was consulting separately with the same lawyer.

Late in June, 1959, the husband met with the wife to arrange a division of property and presented her with a financial statement which he represented as an accurate statement of their estate. The husband led the wife to believe that she was going to receive one-half the value of their joint estate, less certain deductions for the payment of taxes, under a contract for payments to be made by him over a period of ten (10) years. The property division was formalized in a written contract or stipulation prepared by the attorney who, at the same time, prepared a petition to commence a divorce action in the state court which, curiously enough, took the form of a suit by the husband against the wife in which the attorney appeared on the petition as counsel for the husband and prepared an entry of appearance for the wife to sign. The attorney also prepared a will for the wife under the terms of which the estranged husband and the attorney were executors and trustees for her estate with broad powers of management including the power to compromise claims of the estate against third parties. All of these papers were executed by the parties in the lawyer's office. Concurrently, the lawyer filed the divorce petition and the wife's entry of appearance.

About a week later, the lawyer procured the approval of the state court Judge to the property settlement without

a hearing, without evidence and with the knowledge or consent of the wife.

Under the terms of the property settlement stipulation, it became effective immediately and the husband commenced making payments to his wife. The pending divorce action became inactive for a period of approximately six months. At the end of that time and sometime in January, 1960, the wife again called on the attorney and told him in substance, that since her husband had persisted in the conduct which caused her to seek a divorce, she desired an immediate hearing of the divorce action. At this point, the attorney advised her that he represented her husband and that she would have to obtain other counsel. The lawyer and the wife selected another lawyer to appear for the wife. The husband's lawyer prepared an answer and cross-petition which the wife's lawyer signed and filed. The cross-petition was filed on January 15, 1960, and on the following day the divorce action was heard on the wife's cross-petition. The husband did not appear at the trial, but his attorney was present. On the same day that the divorce action was heard, the District Court entered a decree granting a divorce to the wife. No record or transcript of the divorce hearing was made.

Admittedly, there was no evidence offered or received in the divorce hearing as to the financial condition of the husband or whether the property settlement stipulation was adequate, fair or free from fraud. The wife knew little or nothing about her husband's business affairs and the property they had acquired and relied entirely on his representations to her. She did not have the benefit and advice of independent counsel and was deprived of any opportunity for an investigation of her husband's financial affairs.

The truth was that the husband was an astute businessman who had accumulated a very substantial estate during the period of the marriage. He greatly understated his assets and overstated his liabilities to his wife in negotiating the property settlement and he did this deliberately.[1]

The Trial Court found specifically, that the husband had defrauded his wife in the negotiation of the property settlement and awarded her a judgment for $125,000.00 damages. Neither the property settlement nor the divorce decree were in any way influenced, modified or set aside by the judgment of the Federal District Court or the opinion and judgment of the Court of Appeals.

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent will argue that the judgment of the Court of Appeals is not in conflict with applicable State law or the decision of any State Court and a writ should not be granted for the following reasons:

1. Under Kansas law, the property settlement contract continued to have separate vitality and existence and was not merged in or extinguished by the divorce decree.

2. This is an action in tort under Kansas law for fraud practiced by the husband in procuring the wife's agreement to a property settlement contract executed some six months prior to the divorce hearing and is not in any respect a collateral attack on the divorce decree.

3. Even if the property settlement contract were merged in the divorce decree, the judgment of the di-

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1. As an example, certain television properties which he valued at $140,000 in the financial statement given his wife, were sold a few months after the divorce decree for $625,000.

vorce court would not constitute a bar to this action under Kansas law because the approval by the divorce court of the property settlement contract was procured by extrinsic fraud.

4. Even if the property settlement contract were merged in the divorce decree, the judgment of the divorce court would not constitute a bar to this action because, under established Federal law, a United States Court may deprive a litigant of the fruits of a State Court decree obtained through extrinsic fraud.

ARGUMENT

Petitioner's arguments all center around the proposition that in one way or another, respondent is precluded from recovery by reason of the decree of the Divorce Court. Admittedly, the effect of the divorce decree and the extent to which it may influence the present action must be determined according to the law of the State of Kansas. The four points summarized for argument are believed to allow presentation of the Kansas law applicable to the issues presented on this petition in the most logical fashion.

1. Under Kansas Law, the Property Settlement Contract Continued to Have Separate Vitality and Existence and Was Not Merged in or Extinguished by the Divorce Decree

We believe the question of whether the property settlement contract was merged in the decree is actually controlling on all questions presented. If, under Kansas law, the contract continues to have such vitality and separate existence that it could be enforced separately and apart from the divorce decree, then it must follow that the respondent can, in effect, affirm the contract and sue for

damages resulting from the fraud practiced by the husband in procuring her signature to the contract, and such a suit would in no way involve the divorce decree or constitute an attack upon it.

The Kansas courts have developed a strong policy against holding marriage settlement contracts merged or extinguished in divorce decrees on the ground that to do so is to discourage rather than encourage the settlement of marital differences by contract rather than litigation. *Petty* v. *Petty*, 167 Kan. 510, 517, 207 P. 2d 428. While it is possible for a property settlement agreement to be merged in a divorce decree in this State, it is rarely done and a complete review of the Kansas decisions will establish that it was not done in this case.

When the Kansas decisions are correctly analyzed, the following rule emerges: Where the trial court in the divorce action merely approves and confirms the property settlement agreement, or even incorporates the terms in the decree by reference, without actually receiving evidence on whether the division is in all respects fair, equitable and freely made, the settlement agreement is not merged in the decree. *Petty* v. *Petty, supra; In re Estate of Shideler*, 172 Kan. 695, 242 P. 2d 1057. On the other hand, where the Court receives and considers the evidence on which it makes a finding that the settlement is fair, equitable and free from fraud and further makes it clear in the order that the decree supersedes the settlement contract, then, and only then, is the contract merged and extinguished in the decree under Kansas law. *Petty* v. *Petty, supra; Hullet* v. *Hullet*, 133 Kan. 738, 3 P. 2d 470.

The leading case on the subject is *Petty* v. *Petty*, 147 Kan. 342, 76 P. 2d 850; Second Case, 167 Kan. 510, 207 P. 2d 428. In the first case, the trial court awarded the hus-

band a divorce for the fault of the wife, but disapproved a property settlement as unreasonable and unjust and awarded the wife certain terms of alimony and support to be paid by the husband. The Supreme Court reversed the trial court and ordered it to approve the property settlement agreement.

About ten years after the decision in the first case, the wife brought an independent action in a different judicial district (the original case was filed in Salina, the second case in Topeka), claiming that her husband had concealed his whereabouts and his income and had failed to make the payments to her that he had agreed to make in the property settlement. The husband set up as an impregnable defense that this contract had been merged in the judgment issued in the District Court of Saline County after the mandate of the Supreme Court came down, and that plaintiff's only remedy, which was then out of time, was in the court which granted the divorce. The divorce court judgment, entered on the first mandate of the Supreme Court, read:

> "The separation agreement * * * a true and correct copy of which is hereto attached, marked Exhibit 'A' and hereby made a part hereof, be and the same is hereby approved by the Court. * * *"

The settlement agreement, very much like the agreement in this case, provided that in the event a divorce was granted on the petition of either party, the separation agreement would be presented to and approved by the Court, that the wife would have judgment for the payments therein specified, and "no other or further judgment." The Supreme Court rejected the husband's argument in the following language (Kan. Rep. p. 517):

> "There may be jurisdictions (some are cited by appellee) where incorporation of the contract in the

decree by making it a part thereof places it in the status of a judgment or court order so that it can be enforced only as the judgment of the court. Such a rule does not tend to encourage the solution of marital difficulties by contract rather than by recourse to the courts. The tendency in this state has been for the courts to approve and carry out agreements of the parties where they have made a comprehensive contract which is fair and reasonable in its terms. (*Perkins* v. *Perkins*, 154 Kan. 73, 114 P. 2d 804).

"To adopt the rule urged by appellee, and to say the district court of Saline County canceled the separation agreement and incorporated or 'merged' it into a court order of judgment by merely attaching it as an exhibit and making it a part thereof, would not be consistent with encouraging the solution of marital difficulties by the parties themselves. When it is expedient that such contracts be consolidated with or incorporated or 'merged' in the judgment, as urged here by appellee, the courts must accomplish that purpose by positive and intentional language. The district court of Saline County did not do so in its order of judgment of May 23, 1938."

Another case in point is *In re Estate of Shideler*, 172 Kan. 695, 242 P. 2d 1057. The former wife of Shideler, deceased, filed a claim in his estate for payment of installments which would become due in the future under a property settlement agreement executed by the parties at the time of their divorce, which provided for certain monthly payments to be made so long as the wife remained alive and unmarried. The estate defended on the ground that the contract was merged in the decree and since the decree was not for a lump sum awarded alimony (a statutory requirement in Kansas), it was void, at least to the extent that it attempted to create liability which would survive the death of the husband. In the divorce decree, the Court approved the contract and found

and ordered that it "shall be set forth and made a part of this decree."

The trial court sustained a demurrer to the plaintiff's petition. The Supreme Court reversed and held the estate liable on the theory that suit could be brought on the contract alone and not on the decree. The obligations of the contract therefore survived the death of the husband. The following portions of the opinion are noteworthy (Kan. Rep. p. 699):

> "In this case we discern no clear and unequivocal language in the divorce decree requiring a conclusion that the separation agreement was merged in the judgment. *Actually no more appears than that the contract was exhibited to the trial court and that court approved it.*
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> * * *
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> "The holding is not binding here.[1] We find no language in this decree analogous to the above to the effect that the division of property in the settlement was fair and equitable. *For aught that appears in the decree there was no evidence before the trial court other than the contract itself as to the reasonableness or equity of the division.*" (Emphasis added)

In *Thoele* v. *Thoele*, 176 Kan. 655, 272 P. 2d 1082, the Supreme Court permitted suit on an oral contract amounting to a property settlement, as distinguished from a suit on the decree. The plaintiff alleged that in the earlier divorce action a verbal agreement was entered into at the trial whereby the defendant was to give the plaintiff his promissory note for $1,000.00 in settlement of temporary and permanent alimony and rights in certain property acquired during the marriage. After the divorce decree

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1. A reference to *Hullet* v. *Hullet*, 133 Kan. 738, 3 P. 2d 470, relied upon by appellant.

the defendant failed to carry out the terms of his agreement and paid the plaintiff only $110.00. Suit was brought for the balance of $890.00.

The Court's decree apparently made no reference at all to the verbal agreement as such, but merely recited the various terms. With respect to the $1,000.00 indebtedness, a finding of fact appeared in the divorce decree to the effect that the defendant had executed his promissory note for $1,000.00 for temporary and permanent alimony, property division and attorneys' fees. The decree provided that "when said note is paid in full it shall act as full and complete settlement of any and all future claims of the plaintiff against the defendant for her support and maintenance and for the personal property set forth in the preceding paragraph."

The trial court sustained a motion for judgment on the pleadings and opening statement on the theory that the plaintiff had brought suit on the judgment in the divorce decree. On appeal the Supreme Court reversed, holding squarely that suit was properly brought on the agreement. In a reference to earlier decisions, specifically to *In re Estate of Shideler, supra*, the Supreme Court said (Kan. Rep. p. 659):

> "This case (the Shideler case) makes it clear that an agreement between the parties in a divorce case may be sued upon separately and apart from the judgment of the decree."

The Supreme Court of Colorado, in a decision applying the law of Kansas, passed squarely on the ultimate question here in *United States National Bank of Denver* v. *Bartges*, 120 Colo. 481, 210 P. 2d 600, Sec. App. 244 P. 2d 685. The husband was an immensely wealthy man whose financial statements disclosed a net worth of several mil-

lion dollars. The parties became involved in a divorce suit and because of her misconduct, the wife felt compelled to accept a settlement of $325,000. Later, the husband moved to Colorado and the wife sued him for damages for fraud in inducing her to accept the agreed property settlement. On trial of the case in the Colorado court it was established that while the divorce decree contained language to the effect that the property settlement was fair and equitable, in fact, the only evidence submitted to that court was on the existence of grounds for a divorce. The recitals of the decree that the property settlement was fair and equitable were based entirely upon the stipulation of the parties and not the opinion of the court based on evidence. (210 P. 2d 603).

The Supreme Court of Colorado held (citing cases reviewed here) that under Kansas law, there was no adjudication of the property settlement contract in the divorce action and that the settlement contract was not merged in the divorce decree. (210 P. 2d 605). Therefore, the Colorado court said, the divorce decree was not *res judicata* on the issues presented in the later suit (210 P. 2d 606). The Colorado Court did not find any evidence of outright fraud or misrepresentation by the husband, but did allow recovery on the theory of constructive fraud; that is, that the settlement contract was so disproportionate on its face as to constitute a fraud on the wife.

To illustrate that it is possible in Kansas to merge a marriage settlement contract in a divorce decree under circumstances when, as the Supreme Court observed in *Petty* v. *Petty, supra,* "it is expedient that such contracts be consolidated with or incorporated or 'merged' in the judgment * * *", we cite, as does petitioner, *Hullet* v. *Hullet, supra.* This, in fact, is the only case relied upon

by petitioner where the rule of merger was squarely passed upon and applied in Kansas.

In *Hullet*, the question was whether a property settlement contract entered into between the parties at the time of an earlier marriage and divorce, continued to have such separate existence that it could be enforced against the wife after a later remarriage of the same parties and the death of the husband. The question arose in a suit for partition brought by the children of the deceased husband against the widow.

The decree in the earlier divorce action contained the following:

> "And thereupon, the property settlement contract heretofore entered into between plaintiff and defendant upon May 6, 1927, was offered in evidence, * * * and which said contract the court finds makes a fair and equitable division of property as between plaintiff and defendant; and said contract is approved and confirmed, and each of the parties is ordered and adjudged full ownership and title in the property as agreed in said contract."

In holding that the widow was not precluded by other provisions of the marriage settlement contract in which the divorced parties agreed not to claim any right, title or interest in the real or personal property of the other, the Supreme Court said (Kan. Rep. p. 741):

> "The parties did not rest on the contract. It was presented to the court in the divorce action, and the provisions of the contract were carried into the divorce decree. The effect of the decree is described in the opinion of *Conway* v. *Conway*, 130 Kan. 848, 288 Pac. 566. The effect on the subject of the contract, property interests, was that by virtue of the adjudication Hullet had full title to and ownership of his property as a single person, and Mrs. Hullett had full title to and

ownership of her property as a single person. The contract was merged in the judgment, and had no further function to perform as an instrument affecting property interests."

The distinction between Hullet and the cases relied upon by respondent (*Petty* v. *Petty, supra; In re Estate of Shideler, supra; Thoele* v. *Thoele, supra*) lies in the fact that in Hullet, the trial court found as a fact on evidence that the contract made a fair and equitable division of property between the husband and wife and not only incorporated the settlement by reference, but actually indicated an intent to supersede the contract by decreeing title to the property involved. The case must be distinguished on the same ground from *United States National Bank of Denver* v. *Bartges, supra*, in which, notwithstanding the fact that the divorce decree did contain language to the effect that the marriage settlement was fair and equitable, the record disclosed that no evidence was introduced on this point and the parties and the divorce court relied entirely on the agreement.

The Hullet case must be reconciled with *Shideler, Petty, Thoele* and *Bartges* on the basis of the public policy that to encourage property settlements in divorce cases, the parties have the right in Kansas to withdraw consideration of these issues from the divorce court and enter into contracts which continue in existence and may be enforced separately and apart from the decree.

The situation in the case at bar is that the divorce court did not make any finding in the decree that this contract was fair and equitable or free from fraud and everyone admits that no evidence was tendered or received on those issues. Clearly, we think, the parties and the divorce court relied entirely on the agreement.

The decisions of the Supreme Court of Kansas indicate a disposition or trend to resolve all doubts arising from the language of the decree against application of the rule of merger and this is particularly true where sustaining the contract appears to promote equity and justice between the parties.

2. This Is an Action in Tort under Kansas Law for Fraud Practiced by the Husband in Procuring the Wife's Agreement to a Property Settlement Contract Executed Some Six Months Prior to the Divorce Hearing and Is Not in Any Respect a Collateral Attack on the Divorce Decree

Having demonstrated that under Kansas law the property settlement contract was not merged in or extinguished by the divorce decree, it is now possible to examine fully the question whether the divorce decree can be set up as a bar to this action on the claim of *res judicata*, or on any other theory. The first inquiry should be: What is the true nature of the present action under Kansas law?

It is clear from the opinion of the Court of Appeals (Appendix A-1), and we do not understand petitioner to controvert the fact, that this action was brought as a suit for damages for fraud and the judgment was rendered on this theory and no other. In Kansas, a suit for fraud is founded in tort and this is true even where it involves fraudulent conduct in the making of a contract. *Pierson* v. *Holdridge*, 92 Kan. 365, 140 Pac. 1032; *Hewey* v. *Foutz*, 91 Kan. 680, 193 Pac. 407. The right of action is deemed to accrue and the statute of limitations applicable to torts commences to run only upon the discovery of the fraud. *Pierson* v. *Holdridge*, *supra*. This is generally the law in other jurisdictions. 37 C.J.S. *Fraud*, Sec. 64; 24 Am. Jur. *Fraud and Deceit*, Sec. 200.

It is clear from the record in this case that at the time the property settlement contract was signed, and six months later at the time of the divorce hearing, the wife relied completely upon the statements of her husband as to the value of their joint estate (Appendix A5-A6). About three months after the divorce decree, the husband arranged a sale of certain television properties which he had valued to his wife at $140,000, for a price of $625,000. Later, when he closed the sale, it first commenced to become apparent that the husband had badly over-reached the wife (Appendix A7). In other words, the wife first discovered the true facts and her cause of action for fraud and deceit first accrued under State law several months after the divorce decree was made and entered.

Under these circumstances it is clear, we think, that the divorce decree cannot be used to shield the husband from his liability in damages for fraud and deceit any more than it could shield him from any other tort liability accruing to the wife after the divorce; as, for example, assault or negligence in driving an automobile. Divorce courts in Kansas exercise limited statutory jurisdiction (G. S. 1949, Ch. 60, Art. 15), including special statutory provisions for the division of property and the award of alimony. (G. S. 1949, 60-1511). These are jurisdictional in Kansas and orders made in excess of the statutory authority are void. *Conway* v. *Conway*, 130 Kan. 848, 288 Pac. 566. There is no statutory authority granted divorce courts to adjudicate tort liabilities between husband and wife or to assess damages therefor, and we have been unable to find any case in Kansas in which this has been attempted. If the divorce court is without jurisdiction to try tort claims or assess damages, its decree cannot, under Kansas law, be *res judicata* of the present action. *Stroup* v. *Pepper*, 68 Kan. 241, 246, 76 Pac. 825; *Hofstetter* v. *Myers Construction, Inc.*,

170 Kan. 464, 468, 227 P. 2d 115; *The Chanute Brick & Tile Co.* v. *The Gas Belt Fuel Co.*, 89 Kan. 177, 130 Pac. 649; *Smith* v. *Russ*, 184 Kan. 773, 339 P. 2d 286; *Tidewater Oil Company* v. *Jackson Brothers*, 10 Cir., 320 F. 2d 157.[1]

It is true that the divorce court, while lacking jurisdiction to adjudicate the husband's tort liability for fraud and deceit, could have determined whether the property settlement was fair and equitable in the exercise of its statutory authority to divide property and settle alimony. But under the law of Kansas this is not a sufficient basis for petitioner to invoke the rule of *res judicata*. The fact is that the parties settled this matter by agreement and effectively withdrew the issue from consideration by the divorce court. This they have the right and are encouraged to do. *Petty* v. *Petty, supra*. In these circumstances, the critical question is not whether the divorce court could have adjudicated the matter, but whether it did, in fact, do so. *Hofstetter* v. *Myers Construction, Inc., supra; The Chanute Brick & Tile Co.* v. *The Gas Belt Fuel Co., supra; Tidewater Oil Company* v. *Jackson Brothers, supra*.

It is most interesting to observe that according to the decisions of the Supreme Court of Kansas, the rule is that regardless of whether the ultimate question is approached from the standpoint of merger of the contract in the judgment or *res judicata*, the critical test is whether the divorce court received evidence and actually passed upon the question whether the property settlement agreement was fair and equitable and free from fraud. This, we suggest, is as it should be. The two legal theories should operate in harmony. If one party to a divorce action has been defrauded, a court of general jurisdiction to which the controversy is brought ought to have authority to pass

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1 Cert. Den. 375 U.S. 942, 11 L. Ed. 2d 273, 84 S. Ct. 347.

on it if, in fact, the fairness of the contract and the course of dealing between the parties has not been actually litigated before.

The present suit cannot be characterized as an attack on the divorce decree. True, the decree does direct the parties "to carry out and perform the stipulation" and does provide that the husband and wife are "foreclosed and excluded from any claim or demand against the other or the other's property or estate except as provided in such stipulations," but this language can only be construed to refer to claims or demands arising directly out of the marriage relation or the common ownership of property by husband and wife. It cannot mean that the husband is protected forever from liability for tortious conduct toward his wife, especially where such conduct is undisclosed, unknown and the right of action not yet accrued at the time of the divorce.

As the Court of Appeals observed, the provision in the decree which "barred, foreclosed and excluded" each party from any claim or demand against the other, was not an adjudication of the issue of whether the wife was induced to enter into the property settlement by fraud and deceit. It was merely a recital in substance of a provision of the stipulation. (Appendix A10-A11).

Strictly speaking, the present action is not even an attack upon the settlement contract. One who has been defrauded in the making of a contract may ordinarily elect either to rescind the contract and be restored to his original position or affirm the contract and sue for damages for his pecuniary loss resulting from the fraud. In the case of the latter alternative, the course selected here, the action proceeds on the theory that the contract, although fraud-

ulently procured, is affirmed and ratified. 37 C.J.S., *Fraud*, Sec. 63.

Schoonover v. *Schoonover*, (10 Cir. 1949) 172 F. 2d 526, is a case on all-fours with the present action. The case originated in the District of Oklahoma, where the State law is similar to the law of Kansas in respect to the proposition that property settlements between husband and wife may be made by private contract which is not merged in the divorce decree, unless an intention to the contrary is established.

In this case the Court of Appeals laid down the rule that a defrauded wife may bring suit in Federal Court on the diversity of citizenship for damages sustained as a result of the husband's fraud and misrepresentation in procuring her agreement to the property settlement, and where the property settlement contract is not, under State law, merged in the divorce decree, such a suit does not constitute an attack upon the State Court judgment. We submit that in view of the authorities previously cited, this rule is not in conflict with the State law of Kansas and the plaintiff here was entitled to rely on the decision of the Court of Appeals in *Schoonover* in bringing the present action.

3. Even If the Property Settlement Contract Were Merged in the Divorce Decree It Would Not Bar This Action under Kansas Law Because the Judgment Would Be One Obtained Through Extrinsic Fraud

Kansas adheres to the rule that judgments procured through extrinsic fraud, as distinguished from intrinsic fraud, are subject to attack in an independent action brought for that purpose. *Lowry* v. *Lowry*, 174 Kan. 526,

256 P. 2d 869; *Prideaux* v. *Prideaux*, 169 Kan. 644, 220 P. 2d 538; *Stafford* v. *Stafford*, 163 Kan. 162, 181 P. 2d 491; *Putnam* v. *Putnam*, 126 Kan. 479, 268 Pac. 797. Extrinsic fraud, sometimes called collateral fraud, is defined as some act or conduct of the prevailing party which prevented a fair submission of the controversy in the prior action. *Stafford* v. *Stafford, supra; Prideaux* v. *Prideaux, supra; Matheny* v. *Matheny, supra; Putnam* v. *Putnam, supra; Plaster Co.* v. *Blue Rapids Township*, 181 Kan. 730, 106 Pac. 1079.

There are four cases in Kansas which demonstrate sharply that the type of fraud practiced by petitioner here, is extrinsic in character. In *Prideaux* v. *Prideaux, supra*, and *Stafford* v. *Stafford, supra*, the husband negotiated a fraudulent property settlement with his wife and in reliance on the agreement the divorce court did not actually pass upon the extent and value of the husband's property and estate or the fairness of the contract. In these instances, the fraud was held to be extrinsic and the judgment subject to later attack. In *Matheny* v. *Matheny, supra*, and *Putnam* v. *Putnam, supra*, there were fraudulent representations and concealment as to the extent and value of the property subject to division, but in each case the husband took the stand in the divorce case and testified falsely as to his property and financial position. In these circumstances the fraud was held to be intrinsic because the issue was, in fact, submitted to the divorce court and the basis for the improvident division was perjury rather than the independent agreement reached between the parties. See also: *Hodge* v. *Hodge*, 186 Kan. 361, 349 P. 2d 974; *Fincher* v. *Fincher*, 182 Kan. 724, 324 P. 2d 159.

The statutory procedure in Kansas to set aside a judgment for fraud (G.S. 1949, 60-3007 *et seq.*) is not ex-

clusive in the sense that it deprives the litigant of other and traditional remedies available to one so injured. An action brought under Sec. 60-3007 is, in effect, a new or independent action, equitable in character, in which new service on the adverse party is required. *Hardesty* v. *Hardesty*, 150 Kan. 271, 92 P. 2d 49. The Supreme Court of Kansas has held that it has both inherent and statutory power to prescribe a rule of procedure for setting aside or correcting an order fraudulently procured by a litigant in that Court. *Craig* v. *Craig*, 112 Kan. 472, 212 Pac. 72. A minor deprived of his right to compensation for personal injuries by a conclusive suit in a city court could disregard the judgment and bring an independent action in a court of general jurisdiction which could exercise its legal and equitable powers (apart from Sec. 60-3007) to grant adequate redress for the injury. *Leslie* v. *Manufacturing Co.*, 102 Kan. 159, 169 Pac. 193. Where a fraudulent claim was allowed by the probate court as the result of collusion between the claimant and the administrator, orders and judgment allowing the claim, selling land to satisfy the demand and discharging the administrator may be set aside by an independent proceeding in a court of general jurisdiction. *McAdoo* v. *Boten*, 67 Kan. 136, 72 Pac. 529.

The extrinsic fraud rule was stated most emphatically and perhaps more accurately by the Supreme Court of Kansas in *Klemp* v. *Winter*, 23 Kan. 482, 699[1] (Kan. Rep. p. 495):

> "That fraud vitiates everything it touches, final judgments, final orders, final settlements and contracts, as well as things of lesser consequence—we suppose all persons will admit and that courts possessing general equity or chancery jurisdiction, have the power

1. Not reported in Pacific Reporter.

to grant proper relief in all cases of fraud, we suppose will also be admitted."

This statement of the rule has been approved in later decisions. *Busenbark* v. *Busenbark,* 33 Kan. 578, 7 Pac. Rep. 245; *Stegman* v. *Insurance Co.,* 173 Kan. 744, 751, 252 P. 2d 1074.

Klemp v. *Winter, supra,* is in point on its facts. The plaintiff brought an action against former guardians during the guardianship and while concealing the facts of the fraud, had obtained a contract of release from her and a settlement and discharge in the probate court. The guardians challenged the sufficiency of the petition and the jurisdiction of the court on the ground that the action should have been brought in the probate court which had administered the affairs of the minor and the guardianship. The trial court sustained a demurrer to the plaintiff's petition. The Supreme Court reversed the case with the observation that "fraud vitiates everything it touches, including the final judgments * * * contracts," and while the plaintiff might properly have attacked the settlements and orders in the probate court, the district court, a court of general jurisdiction, could afford her a remedy and must take jurisdiction of the case.

To summarize, while respondent does not admit that the property settlement contract was merged in the divorce decree or that the present action should in any way be regarded as a collateral attack on the judgment of the divorce court, the law in Kansas is clear on two points which defeat petitioner's argument: (1) The fraud practiced by the husband on his wife was clearly extrinsic. (2) In Kansas, State court judgments procured through extrinsic fraud are subject to attack in an independent action.

At page 24 of the supporting brief, petitioner cites *Corliss* v. *Davidson and Case Lumber Co.*, 152 Kan. 327, 103 P. 2d 781, in support of the proposition that before a litigant can recover damages on account of a judgment having been fraudulently procured, he must first set aside or reverse the judgment. An examination of that case will show that it does not support the general rule for which it is cited. Not only did the plaintiff in *Corliss* have a judgment entered against him as defendant in a prior action in the State of Oklahoma, after that judgment he filed a motion in the Oklahoma court to set it aside on the ground of fraud. The motion was overruled and no appeal was effected. He then brought an independent action in the Oklahoma courts, again claiming fraud. Following an adverse ruling he appealed the case to the Supreme Court of Oklahoma, where the decision of the trial court was affirmed. It is clear from the opinion of the Kansas Supreme Court, that its decision was based upon the finality of the two unsuccessful attacks on the alleged fraudulent judgment, made in the Oklahoma courts. The case does not in the slightest impair the rule in *Prideaux* and *Stafford* which, incidentally, are later cases; nor does it impair the general proposition that in Kansas judgments procured by extrinsic fraud are open to attack by an independent action. The case of *Horner* v. *Schinstock*,[1] 80 Kan. 136, 101 Pac. 996, is just as clearly distinguishable for it was a case involving intrinsic fraud in the form of perjured testimony at the trial.

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1. Cited in *Corliss* v. *Davidson and Case Lumber Co.*, *supra*.

4. Even If the Property Settlement Contract Were Merged in the Divorce Decree the Judgment of the Divorce Court Would Not Constitute a Bar to This Action Because, under Established Federal Law, a United States Court May Deprive a Litigant of the Fruits of a State Court Decree Obtained Through Extrinsic Fraud

There is a clear line of decisions in the Federal Courts holding that while a United States Court cannot vacate or modify the judgment of the State Court, or mandate the State Court to do so, it may, nevertheless, deprive or restrain a successful litigant from enjoying the fruits of a judgment obtained in State Courts through extrinsic fraud. Such a remedy is available where the basis of federal jurisdiction is diversity of citizenship. In granting the relief the Federal Court does not act in review of the State Court judgment, or concern itself with irregularities in the proceeding. The effect of the Federal Court decree acts directly upon the party and does not affect the judgment. *Arrowsmith* v. *Gleason,* (1869) 129 U. S. 86, 32 L. Ed. 630, 9 S. Ct. 237; *Marshall* v. *Holmes,* (1891) 141 U. S. 589, 35 L. Ed. 870, 12 S. Ct. 62; *Simon* v. *Southern Ry. Co.,* (1915) 236 U. S. 115, 59 L. Ed. 492, 35 S. Ct. 255; *U. S.* v. *Mashunkashey,* (10 Cir. 1934) 72 F. 2d 847 (Cert. Den. 293 U. S. 724, 79 L. Ed. 1255, 55 S. Ct. 551); *Moffett* v. *Robbins,* (10 Cir.) 81 F. 2d 431 (Cert. Den. 298 U. S. 675, 80 L. Ed. 1397, 56 S. Ct. 940); *McMurray* v. *Chase National Bank,* (D.C., Wyo.) 10 F. Supp. 960.

The effect of the judgment awarding the wife damages in the amount of $125,000.00 for the fraud practiced by her husband is merely to deprive the husband of the benefits of his fraudulent conduct. The judgment operates solely against the petitioner. It does not affect in the slightest the divorce decree or, for that matter, the property settlement contract itself. Under these authorities the petition for a writ is clearly without merit. There

would be no conflict between the State and Federal courts even if the property settlement contract were merged in the judgment of the divorce court. *Moffett* v. *Robbins*, *supra*.

CONCLUSION

Petitioner's brief is an example of resourceful argument on carefully selected references to authority. The fact is, however, that petitioner has been unable to present a single case which holds that under the circumstances shown here a damage suit for fraud and misrepresentation cannot properly be brought in the Federal Courts or in any court of general jurisdiction. Petitioner is still faced with the authority of *Schoonover* and the several Kansas cases which declare the public policy in this State to be against the merger of property settlement contracts in divorce decrees. Respondent was badly cheated by her former husband. She has now gained a substantial measure of redress. We submit that she ought not to be deprived or delayed in realizing the benefits of a judgment which, from a factual standpoint, is not under attack.

This is a damage action for fraud and deceit between private litigants. Petitioner has failed to sustain the burden of showing that the judgments of the Court of Appeals and the District Court are in conflict with the applicable law of Kansas.

Respectfully submitted,

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